IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELALTE JURISDICTION

FIRST APPEAL NO. 1684 OF 2005
WITH
CIVIL APPLICATION NO. 3923 OF 2005

Mrs. Gunwanti Arjan Mirchandani,
Age 55 years, R/at Flat No. 601,
Meena Apartment, Co.Op. Hsg.
Society Ltd. 82, Hill Road,
Bandra (East), Mumbai- 400 030. ..Appellant
(Org.Plaintiff)

V/s

The Municipal Corporation of
Greater Bombay, Having its Head
Office at Mahapalika Building,
Mahapalika Marg, Fort,
Mumbai 400 001. ..Respondents.

CORAM : A. M. KHANWILKAR, J.
DATE : 16TH FEBRUARY, 2006.

ORAL JUDGMENT

. Heard the counsel for the parties.

2. Admit.

3. As short question is involved, appeal is taken up for final disposal forthwith by consent. The Corporation issued notice under section 351 of the Bombay Municipal Council Act, 1988 to the appellant who was occupying flat No. 601 of Meena Apartment Co-op.

Housing Society Ltd. 82, Hill Road, Bandra (West) Mumbai 400 050. In this notice it is stated that certain unauthorised work has been noticed in the suit premises of following nature.

(i) Construction of structure of set back terrace 15’-3" X 9’-0" X 7’ with B.M. Walls and ladi-coba roof.

(ii) the construction of barthroom admesuring 7’ X 4’ X 7 with B.M. walls with A.C. sheet roof.

(iii) construction of store room 7’.3" X 5’ X 8’ with B.M. Walls and A.C. Sheet room.

(iv) construction of shed admeasuring 11’.9" X 6’.9"X 7’ with A.C. sheet roof.

(v) construction of godown room admeasuring 11’X 8’.9" X 9’ with B.M. walls with A.C. sheet roof with wooden staircase admeasuring 8’ X 5".

4. In response to this notice under section 351, the appellant filed reply before the Deputy Municipal Commissioner. The substance of the defence taken on

behalf of the appellant was that the structures referred to in the suit notice were already existing and were in the same form when the appellant purchased the flat in the year 1985. The flat was earlier in the name of Mr.Chawala who had purchased the same in the year 1980. According to the appellant, before purchasing the flat she had enquired with the society and being satisfied that the structure was authorised, under bonafide belief, purchased the flat. The offending structures are part of the suit flat. Along with the representation, appellant submitted three documents before the Deputy Municipal Commissioner being xerox copy of plan, an application made to Executive Engineer, Building and Proposal Department for getting certified copies of the amended plans approved by BMC., xerox copy of the agreement made between Shri Baillampalli Seetharam Shetty and Mr. and Mrs. Chawla and the xerox copy of the deed of transfer between Mr.Deepa Chawal and Smt. Gunwanti Mirchandani and others.

5. Specific case of the appellant was that the offending structures were erected by the predecessors of the appellant; that the appellant was given to understand that the same has been erected as per amended

plans approved by the Corporation. Although the appellant applied for getting certified copies of the amended plans, such amended plans were not made available to the appellant. Be that as it may, the Deputy Municipal Commissioner considered the representation of the appellant and rejected the same on the reasoning that from the documents produced by the appellant, it is not possible to ascertain that the existing work (offending work) was carried authorisedly. It is then observed in the order passed by the Deputy Municipal Commissioner dated 8th May, 2001, that in the approved building plan sanctioned under No.Ce/5107/BHS/AH, dated 6/8/1980, it is clearly shown that there is no open set back terrace on 6th floor level where appellant has constructed unauthorizedly. The appellant thus filed the suit before the City Civil Court, Bombay, inter-alia alleging that the notice under section 351 as well as the order passed by the Deputy Municipal Commissioner dated 6th May, 2001, be declared as illegal, bad in law, void unenforceable and issued without application of mind.

6. The trial before the City Civil Court proceeded. Interestingly, the defendant Corporation did not file

written statement nor examined any witness to support its claim. As mentioned earlier the specific case of the appellant before the trial Court was that the offending structures were the part of the flat which was purchased by the appellant from one Mr. Chawala in the year 1985. It is also mentioned in the plaint that in fact the Corporation had issued similar notice in the year 1983 to Mr. Chawala. However no action was taken in spite of the said notice as it is obvious that the Corporation was satisfied that the construction was authorised. The said notice is also produced on record which mentions unauthorised construction of room on the terrace admeasuring 4.57 X 2.93 meters and the construction of shed on the terrace admeasuring 8.10 X 2.04 mtrs which according to the appellant resembles the description of the unauthorised work mentioned in the suit notice. The appellant examined himself and brought relevant documents on record during the evidence. The trial Court has however dismissed the suit holding that the appellant failed to produce any sanctioned plan or amended plan to substantiate her stand that the offending structure was authorised one. The trial Court has observed that the appellant has neither produced any sanctioned plan or amended plans, nor made any attempt

to collect the said documents to establish her case. Accordingly, the trial Court proceeded to dismiss the suit on the finding that the appellant failed to establish that the structure was authorised.

7. The appellant therefore, has carried the matter in appeal before this Court. During the hearing of this appeal, it was argued that the entire controversy can be resolved if the Corporation was directed to produce the relevant sanctioned plan available in their records. Pursuant to the said observation made, the Corporation moved an application before this Court to produce on record a certified copy of the sanctioned plan. The said application was opposed by the appellant. However, by speaking order the application came to be allowed. Accordingly, the copy of the plan is produced by the Corporation which is taken on record and marked at Exh. "M". Interestingly, the copy of the sanctioned plan which is produced on record is of 1979, whereas the Deputy Municipal Commissioner in the order as passed which was impugned in the suit has referred to the sanctioned plan under Nos. Ce/5107/BSII/AH, dated 6th August, 1980. The said plan is not produced on record. Indeed, Counsel for the Corporation made unsuccessful

attempt to contend that the plan which is produced is the only sanctioned plan on the record. However, as noted earlier as Corporation has not filed written statement nor examined any witness, if the oral argument of the Corporation was to be accepted, this Court would be required to do guess work in absence of proof. From the documents which are already produced on record, I find substance in the argument of the appellant that the Deputy Municipal Commissioner in his order has referred to some other document and which document is not forthcoming. There is substance in the argument of the appellant that this is a clear case of non application of mind. It is not possible for this Court to enter into roving enquiry to find out as to whether there was sanctioned plan before the Deputy Municipal Commissioner who passed the order dated 8th May, 2001 for the document referred to in his order has not been placed on record by the Corporation nor any written statement was filed on behalf of the Corporation. Besides, the efficacy of notice issued to the predecessor of the appellant Mr. Chawla, dated 2nd January, 1983 which pertains to the suit structure has not been considered by the appropriate authority. Moreover, the Deputy Municipal Commissioner proceeded to decide the matter

against the appellant without even furnishing the basic documents demanded by the appellant. Taking over all view of the matter, the decision of the Deputy Municipal Commissioner cannot be sustained. The trial Court has completely overlooked the crucial aspects. In my opinion ends of justice would be met if the impugned decisions are set aside and the appellant is relegated before the Deputy Municipal Commissioner for reconsideration of all the materials on record afresh and further documents to be placed on record on behalf of the appellant.

8. Accordingly, the order passed by the Commissioner on 8th May, 2001 and of the trial Court impugned in this appeal are set aside. As mentioned earlier, the Appellant is relegated to the stage of issuance of notice under section 351 by the appropriate authority. It will be open to the appellant to file further documents before the Deputy Municipal Commissioner who in turn shall consider the same afresh in accordance with law without being influenced by the earlier decision passed by his predecessor on 8th May, 2001 or any observations made in the judgment of the City Civil Court or for that matter, in the present

decision. All questions on merit are left open to be decided in accordance with law.

9. First Appeal disposed of accordingly. Consequently, nothing survives in the Civil Application. Even the Civil Application is disposed of.

[A. M. KHANWILKAR, J.]